

Privacy, Proprietary And Union Issues Regarding Rail Recording Systems

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Introduction: This paper will analyze legal issues regarding event recorders in the railroad industry, and union perspective on the use of recorder information.

There are various issues regarding event recorders in the railroad industry. First, and foremost, is the balance between the public's right to know the contents versus the proprietary and privacy interests. To me the answer is clear - the information contained on the recorders should be public information. For employees it is a double edged sword. The event recorder will disclose the actual functions performed by the engineer, and may at times, show culpability. My experience in tort litigation has convinced me that in nearly all cases, the data has established that the engineer performed safely in accordance with applicable rules. A good example of this point

is the San Bernardino, California accident in May, 1989. There, the federal agencies and the railroad involved suspected poor train handling by the crew. However, because of the information provided by the event recorder and some other facts the NTSB absolved the crew.

The admissibility of the event recorder data in railroad tort litigation seems well settled. See Griffin v Kansas City Southern Railway Co., 965 S.W. 2d 458 (Mo.1998); Stuckey v Illinois Central RR, 1998 U.S. Dist. LEXIS 2648 (N.D. Miss. 1998); National Railroad Passenger Corp. v H & P, Inc., 949 F. Supp. 1556 (M.D.Ala.1996). In fact, in most cases the accuracy of the event recorder information is stipulated. See, e.g. Hostetler v. Consolidated Rail Corporation, 123 F. 3d 387 (6th Cir. 1997), or not challenged. See Applegate v. National Railroad Passenger Comp., et. al., 1996 U.S. Dist. LEXIS 13043 (W.D. Mich. 1996); Feichko v. Denver & Rio Grande Western R.R., 13 F. Supp. 2d 1212 (D. Utah 1998); Agnew, et.al. v. Texas Mexican Revy. Co., 1997 Tex. App. LEXIS 3416 (1996); Bakhuyzen v. National Railroad Passenger Corp.; et.al., 20F. Supp. 2d.(W.D. Mich. 1996). Sometimes, issues arise regarding the accuracy of the interpretation of the information contained in the event recorder. See, Stuckey, et. al. v. Illinois Central R.R. Co., 1998 U.S. Dist. LEXIS 2648 (N.D. Miss. 1998). It is worth noting that nowhere in the rulemaking proceedings did the rail industry or the rail labor representatives contend that the event recorder information not be made public.

During the last Congress, Senator Richard Shelby sponsored legislation which was enacted that requires data from federally funded scientific research be made available to the public pursuant to the Freedom of Information Act. This amendment may not be directly applicable, but I can envision arguments being presented by attorneys seeking event recorder data because the source of the regulations was from FRA studies.

This information gives safety investigators necessary information regarding critical train functions which may have contributed to an accident. Moreover, it may be the only non subjective evidence available to a person injured in a railroad accident. Recognition that such information is available provides a powerful incentive to an employee to comply with safe operating procedures.

The impetus for requiring event recorders was the NTSB. As far back as 1969 the Board recommended speed recorders on all mainline trains. In 1978 the Board recommended that FRA require event recorders on trains. As the result of later accidents, the Board again urged that FRA take action. Because of the lack of formal rulemaking, Congress became involved.

As many of you know, in 1988 Congress mandated that railroads equip locomotives with event recorders and the FRA in 1993 promulgated regulations requiring that locomotives be equipped with an event recorder. The recorders are required to register the following functions: time, speed, traction motor amperage, distance traveled, throttle position, application of

dynamic brakes, application of locomotive independent brake; train brake, pipe pressure reduction, and cab signals (if so equipped). Congress further mandated that the event recorders be crashworthy. The FRA has struggled with this latter issue and still has not promulgated a final rule covering survivability of the recorders. The ultimate conclusion seems clear to me-if airlines can manufacture a crashworthy black box, so can the railroad industry.

An important related issue concerns the security of the data that is contained on the recorders. FRA addressed this issue in the 1995 revisions to the original rule. After any reportable accident, a railroad may extract and analyze the recorder data. However, the original or a first order accurate copy shall be retained in secure custody and shall not be utilized for analysis or any other purpose except by direction of FRA or NTSB. The preservation requirement expires 30 days after an accident unless FRA or the Board notifies the railroad that the data are desired for analysis.

CONCLUSION

I believe that the public safety interests dictate that information contained in event recorders be made public. Countervailing arguments of privacy or proprietary rights do not reach the level of the safety needs.

